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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS SOSA, Defendant and Appellant.	F044635 (Super. Ct. No. 03CM3010) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Buckley, Acting P.J., Cornell, J. and Dawson, J.

STATEMENT OF THE CASE

On November 5, 2003, the Kings County District Attorney filed an information in superior court charging appellant with willful infliction of corporal injury upon his spouse resulting in a traumatic condition (Pen. Code, § 273.5, subd. (a)).

On November 6, 2003, appellant was arraigned, pleaded not guilty, and was appointed a defense counsel.

On November 19, 2003, appellant withdrew his plea of not guilty, and entered a plea of guilty to the substantive count.

On December 19, 2003, the court denied appellant's request to withdraw his guilty plea, denied appellant probation, and sentenced him to the middle term of three years in state prison. The court imposed a $600 restitution fine (Pen. Code, § 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (Pen. Code, § 1202.45), ordered appellant to pay a court security fee (Pen. Code, § 1465.8), and ordered him to provide samples of bodily fluids and prints (Pen. Code, § 296, subd. (a)(1)). The court further ordered appellant to pay $1,326 in fines and penalty assessments and awarded him one day of custody credit. The court directed appellant's sentence to be concurrent with the sentence he was serving in misdemeanor case No. 01CM1533[1] and noted "that misdemeanor sentence may be served in any penal institution."

On December 24, 2003, the court ordered appellant to submit to DNA profiling (Pen. Code, § 296, subd. (a)(1).

On December 26, 2003, appellant filed a timely notice of appeal.

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[1] According to the abstract of judgment filed December 24, 2003, the misdemeanor case entailed violations of Vehicle Code sections 23152, subdivision (b) (driving under the influence), 14601.5 (driving a motor vehicle with a suspended or revoked license), and 40508, subdivision (a) (violation of written promise to appear).

STATEMENT OF THE CASE

The following facts are taken from the report of the probation officer filed in superior court on December 10, 2003:

> "On October 12, 2003, at approximately 2350 hours Kings County Sheriff's Deputy Estes responded to … Lynn Street … in Armona on a report of a spousal abuse and met with [E.A.]. According [to] Ms. [E.A.] the defendant accused her of having an affair and while they were arguing pulled her hair forcing her to the floor, then hit her four or five times in the face and head with his closed fist. Deputy Estes observed her nose was bleeding, the left side of her face was red and swollen, and she had a bruise on her upper left arm. According to Ms. [E.A.], she and the defendant have a child in common and had been living with her niece for several days. She further stated this was not the first time the defendant had physically abused her and she wanted to press charges.
>
> "According to Ms. [E.A.'s] niece, [J.G.], she was awoken by screams and crying of her aunt. She saw the defendant pull the victim's hair and punch her in the face with his fist. She then called 911."

DISCUSSION

Appellant's appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record and asks this court independently to review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter of March 29, 2004, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider.

On April 1, 2004, appellant filed a letter brief stating in relevant part:

> "I Lewis Sosa am writing to you in regards of my case.... I want you to know on my appeal[:] (1.) my public defender never fought for my innocence[;] (2.) I would like to bring forth the victim and the so called witness to make their statement[s] before the court[;] (3.) even though I was informed of my rights I was never told I couldn't withdraw my plea.
>
> "In the issue above I would like to make a statement. [U]pon my case my public defender started off with a[] good impression. The second time he urge[d] me to take the plea bargain. He stated since I was already sentence[d] to a year, that it would not make that much of a deal if I took the plea."

A. Advocacy of Appointed Counsel

Appellant apparently contends his counsel was ineffective by failing to assert his innocence of the charged offense.

The following exchange occurred at the November 19, 2003, change of plea hearing:

> "THE COURT: This is on for further pretrial, and I understand there's a resolution; is that right?
>
> "MR. HULTGREN [defense counsel]: Yes, your Honor. At this time we'll be pleading guilty pursuant to People versus West to Count I of the Information.
>
> "THE COURT: Okay, is that your intention, Mr. Sosa?
>
> "THE DEFENDANT: What was that, your Honor?
>
> "THE COURT: Is that what you're planning on doing?
>
> "THE DEFENDANT: Yes, your Honor. [¶]...[¶]
>
> "THE COURT [after enumerating the consequences of a guilty plea]: Do you understand all these possible consequences of your plea?
>
> "THE DEFENDANT: Yes, your Honor. [¶]...[¶]
>
> "THE COURT: All right. You also have a number of rights that you will be waiving or giving up if you change your plea here as indicated. [Court enumerates rights and elicits waivers from appellant.] [¶]...[¶]
>
> "THE COURT: You have the right to require the District Attorney to prove your guilt beyond a reasonable doubt; do you understand that?
>
> "THE DEFENDANT: Yes, your Honor.
>
> "THE COURT: Do you give up that right?
>
> "THE DEFENDANT: Yes, your Honor.
>
> "THE COURT: Do you understand what you've been accused of doing, Mr. Sosa?
>
> "THE DEFENDANT: Yes, your Honor.

"THE COURT: Have you had enough opportunity to have Mr. Hultgren explain the charges to you and what the People have to prove to find you guilty and the possible defenses you might have?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: Are you satisfied you understand everything Mr. Hultgren has told you?

"THE DEFENDANT: Yes, your Honor. [¶]...[¶]

"THE COURT: Okay. I've explained to you, Mr. Sosa – I've explained the possible sentences the sentencing judge could impose in this case. I'm not aware that anybody has made any promises to you on this matter; has anybody promised you a particular sentence or consequence?

"THE DEFENDANT: No, your Honor.

"THE COURT: Has anybody made any other promises or extended any benefit to you other than what might have been stated here in court this morning?

"THE DEFENDANT: No, your Honor.

"THE COURT: On the other hand, has anybody threatened you in any way to get you to change your plea?

"THE DEFENDANT: No, your Honor.

"THE COURT: Are you doing this, then, freely and voluntarily?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: Okay. Any questions about anything I've gone over with you?

"THE DEFENDANT: No, your Honor.

"THE COURT: Mr. Hultgren, do you concur with Mr. Sosa's waiver of rights and consent to his guilty plea?

"MR. HULTGREN: I do.

"THE COURT: And this is pursuant to West?

"MR. HULTGREN: Yes.

"THE COURT: All right. At this time, then, Mr. Sosa, to the charge in Count I of the Information, that in Kings County on or about the 12th day of October of 2003 you did commit a felony violation of Penal Code 273.5, subdivision (a), in that you did willfully and unlawfully inflict corporal injury resulting in a traumatic condition upon Jane Doe, who was your spouse, to that charge how do you plead at this time, sir, guilty or not guilty?

"THE DEFENDANT: Guilty, your Honor.

"THE COURT: I'll accept the plea, find it to be knowingly, intelligently, freely, and voluntarily made."[2]

A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

An appellant bears the burden of proving ineffective assistance of trial counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In demonstrating prejudice, an appellant must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

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[2] Penal Code section 1192.5 states in relevant part: "… The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." The trial court has the burden of inquiry into a factual basis for a guilty plea only for negotiated pleas specifying the punishment to be imposed. Where, as here, a defendant's plea is made without conditions, it is not subject to the "factual basis" requirements of section 1192.5. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1173-1174.)

process that the trial cannot be relied on as having produced a just result. (*In re Visciotti* (1996) 14 Cal.4th 325, 352.)

As the United States Supreme Court has observed, the prejudice component of ineffective assistance focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.) A reviewing court will find prejudice when a defendant demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611; *In re Neely* (1993) 6 Cal.4th 901, 908-909.)

If, as here, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) A review of the record of the change of plea hearing strongly suggests that appellant freely and voluntarily sought to enter a plea of guilty to the charged offense. His claim of ineffective assistance of counsel must be rejected on direct appeal.

B. <u>Statements of Victim and Third-Party Witness</u>

Appellant maintains he "would like to bring forth the victim and the so called witness to make their statement[s] before the court."

Code of Civil Procedure section 909 states:

> "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purposes in the interests of justice, take additional evidence

> of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues."

Code of Civil Procedure section 909 does authorize appellate courts to make findings of fact on appeal. However, that authority should be exercised sparingly and, absent exceptional circumstances, no such findings should be made. Moreover, such authority will not be exercised except to affirm the judgment. (*In re Heather B.* (2002) 98 Cal.App.4th 11, 14.) Here, appellant would have this court exercise the authority conferred under section 909 to do just the opposite, i.e., reverse the judgment. His contention must be rejected.

C. <u>Right to Withdraw Plea</u>

Appellant acknowledges the trial court informed him of his rights at the change of plea hearing. However, appellant contends the court never told him he could not withdraw his guilty plea.

On December 19, 2003, the date set for sentencing, the following exchange occurred in open court:

> "THE COURT: Is there any legal cause why judgment should not now be pronounced?
>
> "MR. HULTGREN: I've spoken with my client this morning, your Honor, and I'm instructed to ask the Court for permission to withdraw his plea. In speaking with him with regard to the grounds for such a request, I'm told that his ground is that he's not guilty of the offense.
>
> "This was a People versus West plea, I checked the transcript and the Court informed Mr. Sosa that he would be legally bound by the plea regardless of his factual guilt. And I've explained to him that I don't believe there are grounds to withdraw the plea. But I am nonetheless instructed to make that request.
>
> "THE COURT: Okay. Do you have anything you wish to add, Mr. Sosa?

"THE DEFENDANT: No, no, your Honor.

"THE COURT: All right. The request to withdraw the plea is denied. We'll proceed with sentencing."

A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound. Should the court consider the plea bargain to be unacceptable, the remedy is to reject it, not to violate it, directly or indirectly. Once the court has accepted the terms of the negotiated plea, it lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree. The People, as well as a defendant, are entitled to enforce the terms of a plea bargain. (*People v. Cunningham* (1996) 49 Cal.App.4th 1044, 1047-1048.)

Penal Code section 1018 states in relevant part:

"Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court.... On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted...."

Penal Code section 1018 requires a showing of good cause to allow withdrawal of a plea. Section 1018 is to be liberally construed and a plea of guilty may be withdrawn for mistake, ignorance, or inadvertence or any other factor overreaching defendant's free and clear judgment. Nevertheless, the facts of such grounds must be established by clear and convincing evidence. The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty. When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. An abuse of discretion is found if the court exercises discretion in an arbitrary, capricious, or patently absurd

manner resulting in a manifest miscarriage of justice. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 495-496.)

In the instant case, appellant did not make the appropriate showing by clear and convincing evidence and the trial court did not abuse its discretion by denying his motion to withdraw the guilty plea. Thus, reversal is not required. Our independent review discloses no other reasonably arguable appellate issues. "[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.